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No. 91-361

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In The

Supreme Court of the United States

October Term, 1991

VICKI LYNNE HOSKINSON, et al.,

Petitioners,

vs.

STATE OF CALIFORNIA, et al.,

Respondents.

Petition For Writ Of Certiorari To The Arizona Court Of Appeals, Division Two

PETITIONERS' REPLY BRIEF TO RESPONDENTS ATWOOD'S BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

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I.

PETITIONER'S ARGUMENT REGARDING THE FACTS OF THIS CASE IS INAPPROPRIATE AT THIS PRETRIAL STAGE

Plaintiffs' case was dismissed below following a summary hearing on jurisdiction alone. No witnesses have been heard nor testimony evaluated. Discovery has been limited to the jurisdictional issue. We are here on the pleadings, not a jury's findings.

The case here stands entirely upon the predicate assumptions stated by the Court of Appeals and detailed in the Petition. Under well established Arizona law, that determination is made *de novo* when the question presented is, as here, a mixed question of fact and law. *Tovrea Land & Cattle Co. v. Linsenmeyer,* 100 Ariz. 107, 114, 412 P.2d 47, 51 (1966). The principle of the Tovrea Land & Cattle Co. case is often cited by the Arizona courts and is not subject to the slightest of doubt regarding its applicability here. *See, e.g. McNeel v. McNeel,* ___ Ariz. ___, 1991 WL 171141 (Ariz.App. 1991); *R.A.J. v. L.B.V.,* ___ Ariz. ___, 1991 WL 156591 (Ariz.App. 1991); *State of Arizona v. Galvan-Cardenas,* 165 Ariz. 399, 400, 799 P.2d 19, 20 (App. 2, 1990). Moreover, as we pointed out in our Petition, Arizona law requires that all disputes of fact be resolved in our favor and all inferences be drawn in our favor. *Corbin v. Challange, Inc.,* 151 Ariz. 20, 725 P.2d 727 (App. 1963). In this respect the law in Arizona is the same as the law followed in the federal courts from time immemorial. *See, e.g. Carlin Communication, Inc. v. Southern Dell,* 802 F.2d 1352, 1356 (11th Cir.1906); *Randolph v. Laeisz,* 096 F.2d 964, 969 (5th Cir.1990); *New Burnham Prairie Homes, Inc. v. Burnham,* 910 F.2d 1474, 1477 (7th Cir.1990).

The court below drew its factual assumptions from PLAINTIFF'S STATEMENT OF FACTS UNDER UNIFORM RULE IV(F) which was filed in the trial court prior to the summary disposition. The Statement of Facts has sixty-three paragraphs and twenty-eight pages and was a part of Appellants' Joint Appendix before the Arizona Court of Appeals. Among the facts that support the Court of Appeals' assumption regarding the Atwoods' reasonable expectations of harm are Paragraph Number 31 which concludes that "Mr. Atwood was aware that his son had been in Arizona on at least four occasions during the preceding two months and, in fact, had been in Tucson for several days" and Paragraph Number 36 which deals with Mr. Atwood's admission that he knew his son was repeating old patterns of behavior that had before led to crime. Every factual statement in both the majority and dissenting opinions in the Court of Appeals is supported by facts in the record and inferences reasonably drawn from them and are thus the foundation upon which this untried case must be decided.

Finally, there is no dispute about the fact that Frank Jarvis Atwood was "kicked out of his parents' house" in Los Angeles a few days prior to the abduction in Tucson. PLAINTIFF'S STATEMENT OF FACTS UNDER UNIFORM RULE IV(F), paragraph 43. That was an intentional act on the part of the Atwoods and is the linchpin of the tort case against them. The predicate act of causation is, as we suggest in the questions presented, an intentional one. Given the high degree of awareness of danger to which even Respondents admit (Respondents' Brief in Opposition, pp. 3-4), that intentional act could be expected to cause consequences in some place distant

from the Atwood home. That is our case. That is the intentional failure to act that led to this tragedy.

II.

RESPONDENTS' ASSERTION THAT LAW OF PERSONAL JURISDICTION IS WELL-ESTABLISHED IS BELIED BY THE MOST RECENT SCHOLARSHIP

Petitioners will not be drawn into debate with Respondents about the clarity of personal jurisdiction doctrine. That is a question appropriately dealt with on the merits should this Court grant the Writ. Since the Petition was filed, however, a symposium on the future of personal jurisdiction doctrine has appeared. The symposium is remarkable because it brings together eight of the leading scholars of personal jurisdiction who demonstrate among them the incredible diversity of views about the meaning of current doctrine. Symposium, *The Future of Personal Jurisdiction: A Symposium on* **Burnham v. Superior Court,** 22 Rutgers L. J. 559 (1991) [articles by Professors Brilmayer, Silberman, Stein, Weintraub, Kogan, Twichell, Redish and Maltz).

III.

RESPONDENTS FUNDAMENTALLY MISSTATE PETITIONERS' ARGUMENT ON THE MERITS

Contrary to Respondents' declaration (Respondents' Brief in Opposition, pg. 13), Petitioners do not assert that a showing of reasonable anticipation "satisfies all due process requirements" in a personal jurisdiction case. That is clearly not the law. We do assert that under the *Volkswagen* analysis such a showing satisfies the predicate

requirement upon which the analysis of "traditional notions of fair play and substantial justice" depends. That inquiry was not undertaken in this case because the court below held that Petitioners had not met a threshold requirement of purposeful "direction." Pet. for Cert. at 15.

Respectfully submitted,

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BRIEF IN OPPOSITION IN BEHALF OF THE STATE OF CALIFORNIA RESPONDENTS

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QUESTIONS PRESENTED

1. A California parolee, breaking his parole conditions, traveled through a number of states and killed a child in Arizona. Is there personal jurisdiction over California in an Arizona state court on the claim that California did not use reasonable care in superintending the parolee?

2. Is a state regarded as a "person" under the due process clause for personal jurisdiction purposes?

LIST OF PARTIES

In accordance with Rule 24.2 of the Rules of this Court, the California respondents accept the list of parties as set forth in the petition. The order of the Supreme Court of Arizona denying review of this case, with a dissent, is set forth in the appendix of petitioner's brief as is the unreported minute entry of the trial judge. The opinion under review, *Hoskinson v. State of California*, is now reported at _____ Ariz. _____, 812 P.2d 995 (1991).

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JURISDICTION

The opinion of the Arizona Court of Appeals under review here is dated December 13, 1990. A timely petition for review was filed in the Arizona Supreme Court which denied review on July 9, 1991. The petition for certiorari was timely and the matter is within the jurisdiction of this Court under 28 U.S.C. § 1257 since the judgment of the state Court of Appeals is the highest court of Arizona in which a decision could be had.

CONSTITUTION AND STATUTES INVOLVED

The due process clause of Section One of the Fourteenth Amendment of the Constitution and the California statutes regarding revocation of parole and escaped prisoners, if relevant, are set forth in the petition and pursuant to Rule 24.2 are not included here.

STATEMENT OF THE CASE

The issue in this case is whether there is specific personal jurisdiction over California in Arizona on the theory of inadequate superintendence of a parolee. The parolee illegally left California, was variously in Arizona, New Mexico, Oklahoma and Texas, and committed a murder in Arizona. The murderer has been convicted, sentenced to death, and is not a party here. We respond to a damages claim against California. A claim against the murderer's parents has been dealt with by other counsel.

On May 16, 1984, Frank Atwood was paroled from a five-year sentence at Vacaville, California.[1] Though he was on probation,

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[1] Petitioners here filed a joint appendix in the court below. The facts set forth in the paragraphs above are taken from the affidavits, depositions, and California state records, pages 94 *et seq.*, in volume one of that appendix.

he left California by car, crossed Arizona spending some time in a woods in the vicinity of Tucson (where he apparently sustained himself by scavenging from the garbage of a McDonald's), passed on through New Mexico, and went to join a homosexual companion in Enid, Oklahoma. He then set out to return to California because it was time for a conference with his parole officer. There was apparently a quarrel between Atwood and his homosexual lover in Enid so that the other man felt threatened and reported Atwood's presence to the Enid police. On August 27, 1984, the Enid police notified the California police that Atwood had apparently been in Enid since August 13, 1984. On September 11, the California parole officer received a call from Atwood from someplace to the effect that he had had a welding accident and that his eyes were bandaged.

In the course of returning to California, on September 17, 1984, Atwood murdered an eight-year-old girl in Tucson. On September 20, he was arrested in Texas.

As noted, Atwood was convicted of murder and sentenced to death. The suit for damages against the State of California and its parole authorities followed, the charge being, essentially, negligent superintendence of the parolee. The record is replete with details as to just how the California parole authorities handled the matter, none of which we discuss here because the issue is purely jurisdictional. Suffice it to say that there is no hint in the record that the California authorities ever sent Atwood to Arizona, or in any way caused or encouraged him to be there or in any way "purposefully availed" themselves of Arizona in any respect at all. Atwood was a wandering parole violator.

Plaintiffs brought this action in the Pima County Superior Court, the state trial court in Tucson, Arizona. The trial court

granted defendants' motion to dismiss for want of personal jurisdiction.[2] As noted above, the state Court of Appeals affirmed with a dissent and the Arizona Supreme Court denied review, also with a dissent, so that this petition properly lies to the Arizona Court of Appeals.

REASONS FOR DENYING THE WRIT

I. There Is Neither Conflict Nor Importance.

1. This matter represents an effort, so far unsuccessful, to have a hard case make bad law. The murder was hideous and so there is some straining at the limits on interstate jurisdiction. The dissenting justices in the Arizona Supreme Court suggest that if under existing law the California defendants cannot be compelled "to defend themselves in Arizona," then, "[i]f this is not possible under the current decisions of the United States Supreme Court, then, with all due respect, we suggest that the time may have come for that Court to reconsider the issue." Petition, App. 20. Petitioners, p. 18, also suggest that, if need be, this Court should consider "abandoning . . . altogether" its well-established "purposeful availment" doctrine on the limits of personal jurisdiction.[3]

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[2] The trial court also rested independently on the doctrine of comity as preserved by this Court in *Nevada v. Hall*, discussed at length *infra*. The court below reaffirmed the judgment of the trial court but did not discuss the comity question.

[3] For a parallel law review article by petitioners' counsel here recognizing that "purposeful availment" is "today the doctrine of personal jurisdiction" and urging the "abandonment" of existing law as "the only prudent course," *see* Woods, *Carnival Cruise Lines v. Shute: An Amicus Inquiry Into the Future of "Purposeful Availment,"* 36 Wayne L. Rev. 1393, 1409-10 (1990). As the court below clearly understood, this Court would have to abandon 30 years of doctrine to uphold petitioners here.

The law of personal jurisdiction is not in the state of primeval chaos from which petitioners would rescue it. It is clearly established from *Hanson v. Denckla*, 357 U.S. 235, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958), through *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472, 105 S. Ct. 2174, 2182, 85 L. Ed. 2d 528 (1985), to *Asahi Metal Industry Co., Ltd. v. Superior Court of California, Solano County*, 480 U.S. 102, 112, 107 S. Ct. 1026, 1032, 94 L. Ed. 2d 92 (1987), that personal jurisdiction depends on two elements, one being substantial justice and fair play, and the other being that the defendant must have such "minimum contacts" as to have "purposefully directed" the offending activities at the forum state. This Court has been unanimous on the "purposefully directed" verbal formula, from Chief Justice Warren in *Hanson v. Denckla*, to Justice Brennan in *Burger King*, to both Justice O'Connor and Justice Brennan in *Asahi*. For a good article on what the author terms this "one abiding jurisdictional truth," *see* Stewart, *A New Litany of Personal Jurisdiction*, 60 U. Colo. L. Rev. 5, 6 & n.7 (1989). This is "the sine qua non of amenability," Wilkowitz, *Beyond Burger King: The Federal Interest in Personal Jurisdiction*, 56 Fordham L. Rev. 1, 4 (1987).

There has been a difference within the Court as to the application of this concept in the stream of commerce cases. Justice O'Connor in *Asahi* for four justices believed that there was personal jurisdiction only where there was a substantial connection between the defendant and the forum state which came about "by an action of the defendant purposefully directed toward the

forum State."[4] 480 U.S. at 112, 107 S. Ct. at 1032. Justice Brennan, concurring, believed that in the stream of commerce cases there was purposeful direction "[a]s long as a participant in this process is aware that the final product is being marketed in the forum State." *Id.* at 117, 107 S. Ct. at 1034.

Justice Brennan, and Justice White who concurred with him, clearly saw the *Asahi* situation as different from that in the opinion written by Justice White in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980). There the Court had held that there was no personal jurisdiction "on one, isolated occurrence . . . the fortuitous circumstance that a single Audi automobile, sold in New York to New York residents, happened to suffer an accident while passing through Oklahoma." 444 U.S. at 295, 100 S. Ct. at 566. *Woodson* went on to say that foreseeability in the light of the inherent mobility of the automobile was not enough to establish minimum contacts between the forum state and the retailer or distributor of the car; a "mere likelihood that a product will find its way into the forum State" is not enough, rather "the defendant's conduct and connection with the forum State are such that he should reasonably

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[4] Some of the cases in which the opinion of Justice O'Connor has been followed are: *Leonardo Da Vinci's Horse, Inc. v. O'Brien*, 761 F. Supp. 1222, 1226 (E.D. Pa. 1991); *In re Perrier Bottled Water Litigation*, 754 F. Supp. 264, 268 (D. Conn. 1990); *Bond v. Octagon Process, Inc.*, 745 F. Supp. 710, 713 (M.D. Ga. 1990), *aff'd*, 926 F.2d 1573 (11th Cir.), *cert. denied*, 111 S. Ct. 2855 (1991); *Tomashevsky v. Komori Printing Machinery Co., Ltd.*, 715 F. Supp. 1562, 1566 (S.D. Fla. 1989); *Sinatra v. National Enquirer, Inc.*, 854 F.2d 1191, 1195 (9th Cir. 1988); *American Greetings Corp. v. Cohn*, 839 F.2d 1164, 1168 (6th Cir. 1988); *Bohannon v. Honda Motor Co., Ltd.*, 682 F. Supp. 42, 44 (D. Kan. 1988); *Local 670 v. Int'l Union, United Rubber Workers*, 822 F.2d 613, 621 (6th Cir. 1987), *cert. denied*, 484 U.S. 1019 (1988); *First City Nat'l Bank & Trust Co. v. Zuckerman*, 682 F. Supp. 182, 184 (S.D.N.Y. 1987); *Gamco Energy, Inc. v. Frost*, 668 F. Supp. 541, 543 (M.D. La. 1987); and *Dittman v. Code-A-Phone Corp.*, 666 F. Supp. 1269, 1271 (N.D. Ind. 1987).

anticipate being haled into court there." *Id.* at 297, 100 S. Ct. at 567.

Atwood was not an article of commerce, and it strains the matter a little to fit him into the factual context of those cases, but the substance is all the same. The effort of petitioners to distinguish due process in tort and contract cases is vain; *World-Wide Volkswagen* was a tort case. Another clear tort illustration is *Calder v. Jones*, 465 U.S. 783, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984), a libel case in California against a Florida publication. Jurisdiction was upheld because "here, the plaintiff is the focus of the activities of the defendants out of which the suit arises." 465 U.S. at 788, 104 S. Ct. at 1486. The mere foreseeability of California circulations was not enough, *id.* at 789, 104 S. Ct. at 1486. Rather, "petitioners are primarily participants in an alleged wrongdoing intentionally directed at a California resident, and jurisdiction over them is proper on that basis." *Id.* at 790, 104 S. Ct. at 1487. We are given no reason why tort defendants should be entitled to less due process than contract defendants.

There was no act by California in respect to Atwood purposefully directed toward Arizona in the formula of Justice O'Connor nor any analogy to "the regular and anticipated flow" of the criterion of Justice Brennan. To the extent that those cases fit at all, this is the isolated occurrence, it is a "fortuitous circumstance" that this episode occurred in Arizona. No matter what construction of the concept of "purposeful availment" in any of this Court's cases or separate opinions, there is no element of "purposeful availment" here.

Petitioners oscillate between a concept of "objective awareness," p. 11 (hitherto unknown to the law of personal jurisdiction), and a claim of "reckless and wanton conduct," p. 14. Since

the "objective awareness" concept has not yet appeared in the law of personal jurisdiction, petitioners seek to import it from another area, governmental immunity, *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982), and *Malley v. Briggs*, 475 U.S. 335, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986). Not only do those cases have nothing to do with due process or personal jurisdiction, but there the "objective standard" is used to restrict jurisdiction, narrowing it from what Justice Powell describes in *Harlow* as an earlier, subjective standard. Here petitioners seek to import such a concept (whatever it is in this context) for the exact opposite purpose. The invocation of the words "reckless and wanton conduct" as a talismanic construct of the pleader's art, if allowed could create jurisdiction in any case by simply invoking a verbal formula. The reality of minimum contacts cannot be so lightly avoided.

Petitioners also cite *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 312 n.5, 101 S. Ct. 1784, 1790 n.5, 68 L. Ed. 2d 114 (1981). As that opinion shows, this was originally a federal common law claim in the original jurisdiction of this Court; jurisdiction was discretionarily declined in favor of a district court remedy pursuant to *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 91 S. Ct. 1005, 28 L. Ed. 2d 256 (1971); venue was expressly authorized under 28 U.S.C. § 1391(b). None of the special circumstances there exist here.

2. *Nevada v. Hall*, 440 U.S. 410, 99 S. Ct. 1182, 59 L. Ed. 2d 416 (1979), is the first case holding that one state can be sued in the courts of another. That case involved a Nevada motor vehicle in an accident in California. Footnote 24 to that case suggested that there would be some limitations as to the types of

matters subject to interstate suits, limitations which it has not yet been the duty of this Court to define.

However, there has been substantial litigation in the states. All of these cases have involved alleged direct action by the defendant state in the forum state, and even then there have been limitations. *See*, for example, *Guarini v. New York*, 215 N.J. Super. 426, 521 A.2d 1362, *aff'd*, 215 N.J. Super. 293, 521 A.2d 1294 (1986), *cert. denied*, 484 U.S. 817 (1987), in which New Jersey residents sued the State of New York in New Jersey state courts for a determination that the Hudson River islands were under the jurisdiction of New Jersey. The New Jersey court, directing its attention to footnote 24, said, "Plaintiffs, if successful, would clearly interfere with New York's capacity to fulfill its own sovereign responsibility over those two islands in accordance with and as granted by the 1833 compact. Exercise of jurisdiction by this court would thereby pose a 'substantial threat to our constitutional system of cooperative federalism.'" 521 A.2d at 1367.

Other post-*Nevada v. Hall* decisions are *Struebin v. Iowa*, 322 N.W.2d 84 (Iowa), *cert. denied*, 459 U.S. 1087 (1982), jurisdiction taken in Iowa against Illinois concerning a claim of negligence by Illinois in maintaining a bridge which it was obligated by contract to maintain on the Iowa side of the Mississippi River; and *see similarly* on inadequate border warning signs, *Wendt v. Osceola County, Iowa*, 289 N.W.2d 67 (Minn. 1979). Two other traffic cases between the District of Columbia and Virginia are *Biscoe v. Arlington County*, 738 F.2d 1352 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1159 (1985), and *Daughtry v. Arlington County, Virginia*, 490 F. Supp. 307 (D.D.C. 1980). *See also Ehrlich-Bober & Co. v. University of Houston*, 49 N.Y.2d 574, 404 N.E.2d 726, 731 (1980), where jurisdiction was taken in a New York state court because all of the principal activities had "centered in New York."

There are two parolee cases in which a claim of negligent supervision is made and in which the case was allowed to go forward in the forum state without requiring that it be brought in the state of parole. Both of these cases rest entirely on the element of overt personal availment by the paroling state which is so completely missing in the instant case. In *Peterson v. Texas*, 635 P.2d 241 (Colo. App. 1981), the injury was done by a juvenile in Colorado who had been paroled by Texas. The program itself in Colorado was sponsored by the Texas state agency and the "defendant McIntire, who was in charge of the program in Colorado as an agent of the State of Texas," was directly involved in the alleged negligent supervision, 635 P.2d at 242. In *Mianecki v. Second Judicial District Court*, 99 Nev. 93, 658 P.2d 422, *cert. denied*, 464 U.S. 806 (1983), a Wisconsin parolee committed an offense in Nevada and suit was allowed in the latter state. There the Wisconsin Department of Corrections had expressly approved the relocation of the probationer in Nevada; the Nevada court held that the express authorization by Wisconsin of the move to Nevada without adequate investigation of or warning to the place in which the probationer would stay permitted the suit to be brought in Nevada.

In short, in the only two parole cases discovered, the state of parole was made subject to suit in the forum state where the state of parole had purposefully availed itself of the forum state, once by participation under its own supervision in a program in the forum state and the second time by direct authorization to go to the forum state. In the instant case, we have a plain fugitive from justice, breaking his parole, who was not authorized to go anywhere.

In *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. at 291-92, 100 S. Ct. at 564, this Court said that the concept of minimum contacts has two objectives, one to protect defendants against dis-

tant or inconvenient forums, and the other "to ensure that the States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." This relates directly to the concept of federalism reserved in footnote 24 of *Nevada v. Hall*. Petitioners seek a "reaching out" into California's administration of its laws.

We make the critical point for certiorari purposes: There is no conflict of decisions.[5] No jurisdiction, state or federal, has yet held that a lawfully released parolee who breaks his parole and wanders off to another state subjects the home state to liability for his conduct in his travels. The only case remotely suggested as a conflict by petitioners is *Roth v. Garcia Marquez*, 942 F.2d 617 (9th Cir. 1991). This is a contract case in which a movie producer in California sued an author in Mexico City and his literary agent in Spain claiming breach of a contract concerning the right to make a film. The jurisdictional question was whether this suit could be brought in California. The Court of Appeals declared that the test for personal jurisdiction was that the nonresident defendant must

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[5] We do not suppose that conflict with a law review article justifies certiorari, but in any case none of the four articles petitioners cite, p. 21, conflict with the court below. Kogan, *A Neo-Federalist Tale of Personal Jurisdiction*, 63 S. Cal. L. Rev. 257, 363 (1990), describes "purposeful availment" as the standard "adopted by the Supreme Court." Seidelson, *A Supreme Court Conclusion And Two Rationales That Defy Comprehension: Asahi Metal Indus. Co., Ltd. v. Superior Court of California*, 53 Brooklyn L. Rev. 563 (1987), is equally critical of both Justice O'Connor's four-Justice opinion in *Asahi* and the eight-Justice portion. Maltz, *Unraveling the Conundrum of the Law of Personal Jurisdiction: A Comment on Asahi Metal Industry Co. v. Superior Court of California*, 1987 Duke L.J. 669, 682, observes that "purposeful availment remains the most important element in almost all personal jurisdiction cases"; the issue is construction of the phrase "purposeful availment," and as we have developed, this case does not qualify under any definition. Perdue, *Personal Jurisdiction and the Beetle in the Box*, 32 B.C.L. Rev. 529, 536 (1991), fully recognizes that the Court from 1958 to 1991 has repeatedly required that the defendant have "purposefully affiliated" with the forum state.

have purposefully availed himself of the privilege of conducting activities in California by some affirmative act or conduct and found that in the context of the negotiations the fact that the film was to be produced in California was enough to give jurisdiction. We perceive no analogy between that case and the case at bar.

Even a court used to drawing fine lines would be hard put to make the distinctions required here if petitioners' position were accepted. If a suit lies in the state court of State B on a claim that State A negligently superintended a parole violator, how about a claim that the state negligently licensed a senile driver, or that it failed to control the Mediterranean fruit fly, or that it negligently failed to arrest the perpetrator of a telephone scam? *Nevada v. Hall* was never intended to put every regulatory or supervisory act of a state without more at issue in another state's courts.

3. The issue is not one of public importance. There are the two "deliberate parolee" cases just cited, but we are cited to no other instance of any suit against a state because of the misdeeds of a wandering parolee. The only such case with which we are acquainted is *Chavez v. Indiana*, 122 Ariz. 560, 596 P.2d 698 (1979), which is analogous in that an unauthorized Indiana parolee committed a crime in Arizona resulting in a suit against Indiana in Arizona. The Arizona Supreme Court ordered dismissal of the complaint because it found no personal jurisdiction over the defendant, exactly as was held here.

It is not enough to say that personal jurisdiction presents an important legal problem. This case, the only one that is here, presents a routine application of well-established principles. The only potential for public importance on these facts would have been if the Arizona courts had adopted the position of petitioners' counsel, *see* footnote 3, and "abandoned" the existing law.

II. The State Is A Person For Personal Jurisdiction Purposes.

Petitioners contend that the state is not a "person" for purposes of raising the defense of want of personal jurisdiction under the Fourteenth Amendment. The principal reliance is on *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989). *Will* is tightly limited to analysis of legislative history as to the intent of the word "person" in the Civil Rights Act and has no bearing beyond that. State "personhood" depends on the statute and other statutes reach other results on the same point. For example, the state is a "person" under Section 16 of the Clayton Act, *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 447, 65 S. Ct. 716, 721, 89 L. Ed. 1051 (1945), and for numerous early citations *see United States v. Cooper Corp.*, 312 U.S. 600, 619, and particularly n.6 and attached text, 61 S. Ct. 742, 744, 85 L. Ed. 1071 (1941), *dissent*, and note in the *Cooper* majority opinion at 312 U.S. 604 that the United States is a "juristic person" for many lawsuit purposes. It is a "person" under the New York Civil Practice Act, *Sherwood v. United States*, 112 F.2d 587, 595 (2d Cir. 1940). Other instances in which the state is a "person" are *United States v. Shirey*, 359 U.S. 255, 257-58 n.2, 79 S. Ct. 746, 747-48 n.2, 3 L. Ed. 2d 789 (1959), and *Ohio v. Helvering*, 292 U.S. 360, 370, 54 S. Ct. 725, 727, 78 L. Ed. 1307 (1934).

Without doubt, Congress can authorize "private suits against States or state officials," *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456, 96 S. Ct. 2666, 2671, 49 L. Ed. 2d 614 (1976); the only question under any given statute is whether it did or not.

We need not go into much learning on this topic because the question is foreclosed by *Nevada v. Hall*, which is the pedestal of petitioners' entire case. That decision says that "[a] judgment entered in one State must be respected in another provided that the

first State had jurisdiction over the parties and the subject matter," 440 U.S. at 421, 99 S. Ct. at 1188 (emphasis added). Surely we can have no exercise in futility by which California can be subject to judgment in Arizona and then be free to ignore that judgment when it is sought to be enforced because of want of jurisdiction in Arizona.

In the earlier portion of this memorandum we have cited numerous cases in which the states in the post-*Nevada v. Hall* world have considered whether there was personal jurisdiction over the defendant state and these were not vain exercises. Every state case has accepted the obvious, that state court jurisdiction over another state under *Nevada v. Hall* is limited to instances in which the forum state has personal jurisdiction. If a state is not a "person" for due process purposes, any state could be sued anywhere for anything with no nexus to the forum at all; California could be sued, for example, in the state court in Maine in a matter on which it has no contacts, however slight, on the theory that due process does not extend to states. The reason that governments can litigate in any case is because they are regarded as "persons" for the purpose of being either in (or in this case out) of the courts; *see United States v. Cooper Corp.*, 312 U.S. at 605, 61 S. Ct. at 743.

CONCLUSION

It is respectfully submitted that the petition for certiorari should be denied.

RESPECTFULLY SUBMITTED.

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